

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

COMMONWEALTH OF VIRGINIA

vs.

LEE BOYD MALVO

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Criminal No. 102888

RESPONSE TO MOTION #5 - MOTION TO DECLARE THE VIRGINIA STATUTES
UNCONSTITUTIONAL AND PROHIBIT THE IMPOSITION OF THE DEATH PENALTY

In support of its motion the defense files a memorandum which can best be described as sixty eight pages of diatribe against the Supreme Court of Virginia. It cites surprisingly few Virginia cases and then only to tell us how wrong they are. This is in spite of the fact that virtually all of the Virginia capital cases cited had certiorari denied in the United States Supreme Court. Obviously the supposed constitutional flaws were not as visible to that Court.

The fact of the matter is that all of the so-called constitutional errors have been ruled upon over and over again by the Virginia Supreme Court. Without exception the rulings have been contrary to the position taken by the defense. They have essentially made five claims of constitutional inadequacy. Cited below are just some of the Virginia Supreme Court holdings to the contrary.

1. Failure to provide meaningful guidance to the jury.

Jones v. Commonwealth, 228 Va. 427, 446 (1984)
Satcher v. Commonwealth, 244 Va. 220, 227 (1992)
Stewart v. Commonwealth, 245 Va. 222, 229 (1993)
Cherrix v. Commonwealth, 257 Va. 292, 299 (1999)
Lenz v. Commonwealth, 261 Va. 451, 459 (2001)

2. Failure to inform and instruct the jury on its consideration of mitigating evidence.

Watkins v. Commonwealth, 229 Va. 469, 490-491 (1985)

Satcher v. Commonwealth, 244 Va. 220, 228 (1992)

Breard v. Commonwealth, 248 Va. 68, 74 (1994)

Lovitt v. Commonwealth, 260 Va. 497, 508 (2000)

Buchanan v. Angelone, 522 U.S. 269, 275-76 (1998)

3. The Virginia statutes violate the constitution because they allow in the penalty phase unadjudicated criminal conduct and fails to require a standard of proof.

Williams v. Commonwealth, 248 Va. 528, 536 (1994)

Goins v. Commonwealth, 251 Va. 442, 453 (1996)

Cherrix v. Commonwealth, 257 Va. 292, 299 (1999)

Lenz v. Commonwealth, 261 Va. 451, 459 (2001)

4. The Virginia statute is unconstitutional because it allows, but does not require, that the sentencing court set aside a death sentence upon a showing of good cause and permits the court to consider hearsay in a post sentence report.

Breard v. Commonwealth, 248 Va. 68, 76 (1994)

Cherrix v. Commonwealth, 257 Va. 292, 299 (1999)

Lovitt v. Commonwealth, 260 Va. 497, 509 (2000)

Lenz v. Commonwealth, 261 Va. 451, 459 (2001)

Thomas v. Commonwealth, 263 Va. 216, 224 (2002)

5. Appellate review procedures are unconstitutional.

Satcher v. Commonwealth, 244 Va. 220, 228 (1992)

Williams v. Commonwealth, 248 Va. 528, 536 (1994)

Mickens v. Commonwealth, 252 Va. 315, 320 (1996)

Lovitt v. Commonwealth, 260 Va. 497, 508 (2000)

Lenz v. Commonwealth, 261 Va. 451, 459 (2001)

Respectfully submitted,

ROBERT F. HORAN, JR.
Commonwealth's Attorney

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the above Response was mailed, first class to Michael S. Arif, Counsel for Defendant, 8001 Braddock Road, Suite 105, Springfield, VA 22151 and Craig S. Cooley, Counsel for Defendant, 3000 Idlewood Avenue, P.O. Box 7268, Richmond, VA 23221, this 24th day of February, 2003.

ROBERT F. HORAN, JR.
Commonwealth's Attorney

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RESPONSE TO MOTION 8 – MOTION IN LIMINE
REGARDING THE ADMISSIBILITY OF PHOTOGRAPHS

It is clear that a pre-trial motion in limine is an improper vehicle to test the admissibility of photographs. The court neither sees the photographs nor does it have the factual basis upon which to decide the admissibility question. There is no doubt that under Virginia law crime scene photographs of the victim and/or autopsy photos are not per se inadmissible.

In Commonwealth v. Smith, 219 Va. 455 (1978), the first capital punishment case to reach the Virginia Supreme Court after Virginia amended its capital punishment statute in 1976, the court said at page 467:

“The admissibility of photographs is a matter within the sound discretion of the trial court. Inge v. Commonwealth, 217 Va. 360, 364 (1976). There is no abuse of discretion in admitting photographs which are relevant and material to establish premeditation and malice and to show the degree of atrociousness of the crime.” Brown v. Commonwealth, 215 Va. 515, 519 (1971).

As was said by the Court at page 222 in Payne v. Commonwealth, 257 Va. 216 (1999):

“We consistently have held that the admission of photographs into evidence rests within the sound discretion of a trial court, and the court’s decision will not be disturbed on appeal unless the record discloses a clear abuse of discretion. Walton v. Commonwealth, 256 Va. 85, 91-92, 501 S.E.2d 134, 138 (1998); Goins v. Commonwealth, 251 Va. 442, 459, 470 S.E.2d 114, 126, cert. denied, 519 U.S. 887 (1996); Washington v. Commonwealth, 228 Va. 535, 551, 323 S.E.2d 577, 588 (1984), cert. denied, 471 U.S. 1111 (1985). Photographs of a victim are admissible to prove motive, intent, malice, premeditation, method, and the degree of atrociousness of the crime. Walton, 256 Va. at 92, 501 S.E.2d at 138; Goins, 251 Va.

at 459, 470 S.E.2d at 126. Photographs that accurately portray the crime scene are not rendered inadmissible simply because they are gruesome or shocking. Walton, 256 Va. at 92, 501 S.E.2d at 138; Gray v. Commonwealth, 233 Va. 313, 343, 356 S.E.2d 157, 173, cert. denied, 484 U.S. 873 (1987); Washington, 228 Va. at 551, 323 S.E.2d at 588.”

A graphic photograph is admissible so long as it is relevant and accurately portrays the scene of the crime. Clozza v. Commonwealth, 228 Va. 124, 135 (1984). If photographs accurately depict the crime scene, they are not rendered inadmissible because they are gruesome or shocking. Gray v. Commonwealth, 233 Va. 313, 343 (1987). The crime scene photos to be offered by the Commonwealth will accurately portray the crime scene. At this time the Commonwealth has no intention of using autopsy photographs other than for identification of a victim.

Respectfully submitted,

—
ROBERT F. HORAN, JR.
Commonwealth's Attorney

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the above Response was mailed, first class to Michael S. Arif, Counsel for Defendant, 8001 Braddock Road, Suite 105, Springfield, VA 22151 and Craig S. Cooley, Counsel for Defendant, 3000 Idlewood Avenue, P.O. Box 7268, Richmond, VA 23221, this 24th day of February, 2003.

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ROBERT F. HORAN, JR.
Commonwealth's Attorney